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NO. 84-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO GOVERNMENT'S BRIEF IN OPPOSITION

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Statement Response

The basis of the Government's argument rests on portions of its "statement" which are unsupported by the record and in fact, untrue. In fact, the allegations are so ridiculous, this Court can take judicial notice of the fact that they are untrue.

The premise of the Government is that Tony Blauvelt's attempt to make a legal argument to the Grand Jury, which was not legally rational, can be used later to impeach him (and therefore, destroy the credibility of the Petitioner's only witness) in trial. This premise is based on the faulty assumption that Tony Blauvelt ". . . had been afforded a full opportunity to explain his failure to file the required tax returns, . . ." (see Government's argument, page 5). The record does not reflect this. There are no references to the record reflecting this. This Court can take judicial notice of the fact that Federal Grand Jury investigations are generally controlled by the Attorney General.

Argument Response

The Government maintains Tony Blauvelt, the Petitioner's only witness, had a *full* opportunity to explain to the Grand Jury. This representation is patently dishonest. None of the Government's references support this. In fact, Mr. Blauvelt was cut off on several occasions during his two minutes before the Grand Jury, once by Mr. Wallace.

Even if he had been given this full opportunity, his failure to know that his fear of prosecution was his best defense is not a contrary position. The record does not reflect Mr. Blauvelt argued facts to the Grand Jury, only incompetent law.

The Government's attempt to categorize the statements of the prosecutor (who no longer works for the Government) as " . . . offered simply to show that Petitioner had been advised of his rights, not to prove the truth of the matters asserted therein." (See Government's response brief, page 6), is not only a dishonest

representation, but categorically absurd. If the Government wanted to prove Mr. Blauvelt had been told his rights and Mr. Wallace as prosecutor told the jury he had, this would clearly be a statement offered to prove the matters asserted, but the Government either intentionally wants to navigate this Court to the wrong waters or has just missed the boat completely.

The purpose of statements by the unsworn Government witness, Assistant Attorney General, Wallace, like: "Well, would it be safe would you agree with me having read that Grand Jury testimony and the information that you gave that Grand Jury was totally different from what you have given to these folks?", (transcript page 356), was to force the jury to choose between Mr. Wallace's version or Mr. Blauvelt's version, not merely prove he had told Mr. Blauvelt what his rights were. Mr. Wallace's "conduct", which the Fifth Circuit refused to exonerate, went uncross-examined and unimpeached, and in fact, was given from "an eyewitness", from a nearly unimpeachable source, an officer of the Court, and the attorney for the United States Government.

The Government's argument seeks to limit this Court's examination to the mere improper use of Grand Jury testimony claiming Mr. Blauvelt is not believeable because during the approximate two (2) minutes, this layman spent before the Grand Jury, Mr. Blauvelt, representing himself, asserted an unusual unsupportable legal theory. This "theory", as the trial Court found, was not inconsistent with his testimony at trial. The Government's entire defense for the improper use of this testimony was impeachment, yet as the Court ruled, his Grand Jury testimony did not impeach his trial testimony. The

record does not reflect that, but the record does reflect *the persistent suggestion of Wallace* that something improper had been done by the Petitioner's only witness, Tony Blauvelt, in front of the Grand Jury which had indicted him and the Petitioner, and that Wallace had caught him, so he changed his story, (see Petitioner's brief and supra). The only "impeachment" was the "testimony" of the Attorney General, not the Grand Jury statements. This "impeachment" was improper and dishonest.

The fact that the "testimony" came not only from the Grand Jury, (according to the implications of Wallace), but from the Attorney General personally, is of great importance.

Blauvelt's statements were admitted as prior inconsistent statements, which they were not. The Government now contends they should also be admitted as admissions, although they weren't offered as admissions. In any event, admissions of what? That he believed he was a scapegoat? Blauvelt's statement to the Grand Jury that he was a scapegoat is in no way inconsistent with his testimony that he had been threatened with criminal prosecution (in light of the subsequent trial and conviction, a highly credible position), the Government now calls "a recent fabrication".

Finally, the Government's curious new representation that hearsay isn't hearsay must be examined.

The Government states two (2) of its seventy-five (75) Grand Jury references were innocent efforts to prove the witness had been advised his rights "not to prove the truth of the matters asserted therein." Assuming arguendo that this could possibly be relevant or that the remaining

seventy-three (73) references to the Grand Jury would not be prejudicial, wasn't Mr. Wallace's statement telling the jury he had told Mr. Blauvelt his rights, an effort to support the truth of his implied assertions that he was a "fair" and honest prosecutor and that the jury could believe him? Wasn't it really additional testimony?

The Government's efforts to distinguish this case from the United States Court of Appeals for the District of Columbia's clear decisions supporting the Petitioner's position seem to be based primarily on this Court's recent holdings in *Tennessee v. Street*, (No. 83-2143) (May 13, 1985), which the Government obviously for purposes of emphasis repeats on page 5 of its brief and page 6.

Unfortunately, the Government makes no specific references to the case because it does not support the Government's position, in fact, the rationale behind the *Tennessee* decision tends to support Petitioner's position, clearly demonstrating this Court's strong support for the confrontation clause of the Constitution stating in relevant part:

> "The clause's fundamental role in protecting the right of cross-examination was satisfied by the Sheriff's presence on the stand."

(In the instant case, the source of the statements, Wallace, did not take the stand); and also, in Justice Brennan's concurring opinion supported by Justice Marshall, ". . . the record contains no suggestion that the State was engaged in any improper effort to place prejudicial hearsay evidence before the jury."

In the instant case, the record not only makes the suggestion, it shouts it out. *Tennessee* does not deal with

improper Grand Jury references and implications, nor does it deal with improper Government "testimony". The instant case does.

The Government now argues that the author of the *Tennessee* decision, the Chief Justice of the Supreme Court of the United States, no longer supports the position he concurred with, in *Bartley v. U.S.*, 319 F.2d 717, (Dist. of Col. Cir. 1963), [attacking unacceptable hearsay and supporting *Young v. U.S.*, 214 F.2d 232, (Dist. of Col. Cir., 1954) a case on point with the instant case], and no longer supports this entire Court which clearly spelled out in its recent opinion (*Tennessee* supra) strong support for the confrontation clause.

In another of the Government's cases, *Dutton v. Evans*, (see 91 S.Ct. 210, 1970), Justice Harlan in his concurring opinion summed up a large portion of the problem in the instant case: .

> "The question in each case, therefore, was whether there had been adequate 'confrontation' to satisfy the requirement of the clause."
>
> (Confrontation clause).

There was nothing to impeach in the record, (the rationale in *Tennessee* coupled with safeguards). The statements were entirely consistent. There was no confrontation or method of confronting Mr. Wallace's statements such as; ". . . Would you agree with me . . .?"

Justice mandates that this Court of final jurisdiction not agree with Mr. Wallace.

Conclusion

For all of these reasons stated herein and in Petitioner's Brief, either a judgment of acquittal or a new trial for the Petitioner should be granted.

Respectfully submitted,

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